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Thomas Wong Ha Ming v Loo Wee Tee

B HIGH COURT (KUCHING) — SUIT NO KCH-22NCC-1/5 OF 2017
STEPHEN CHUNG J
28 MARCH 2018

C *Contract — Claims — Claim for money lent — Plaintiff lent money to defendant — Plaintiff and defendant entered into agreement for payment of money lent by way of instalments — Defendant defaulted in payment — Plaintiff entered caveat on defendant's land — Whether plaintiff lent any money to defendant — Whether plaintiff's claim illegal — Whether caveat should be removed — Whether plaintiff had sustained loss — Whether plaintiff entitled to damages — Civil Law Act 1956 s 26 — Contracts Act 1950 ss 24 & 31*

D

E The plaintiff had claimed for the sum of RM2,070,000 being the outstanding balance of money lent to the defendant. Alternatively, the plaintiff pleaded and claimed that the defendant had admitted a total sum of RM2,875,000 due and payable by the defendant to the plaintiff pursuant to an agreement dated 17 May 2011 wherein the defendant agreed to pay the said sum by 25 monthly instalments of RM115,000. The plaintiff argued that he had paid

F RM2,875,000 to the late Chan Yau Chiang ('Chan') and Huang Yu Kiang ('Huang') to settle the debts owing to them on behalf of the defendant. It ought to be noted that the plaintiff had lodged caveat against the defendant's one-half share of his landed property located in Kuching. The defendant denied the plaintiff's claim and said that he had duly paid part of the gambling debt and

G the accruing interest charged by the plaintiff. The defendant submitted that the sum of RM2,875,000 derived partially from the gambling debt and partially from accruing interest on the gambling debt was incorrect. The defendant further argued that since the plaintiff had no valid license to operate as casino junket and moneylender, the said RM2,875,000 claimed by the plaintiff was

H illegal. The issue for court's decision was whether the plaintiff lent any money to the defendant.

Held, dismissing the plaintiff's action with costs of RM25,000 subject to allocator:

I (1) The plaintiff did not produce any proof that: (a) he lent the sum of RM1,150,000 or RM2,070,000 or RM2,875,000 to the defendant; and (b) he had paid either of these sums to the late Chan and Huang on behalf of the defendant. As such, on balance of probabilities, the plaintiff had failed to prove that he lent the sum of RM2,070,000 to the defendant or

that he paid RM2,875,000 to the late Chan and Huang to settle the debts owing to them on behalf of the defendant (see paras 21 & 23).

(2) Under s 26 of the Civil Law Act 1956 and s 31 of the Contracts Act 1950, all agreements by way of gambling or wager shall be null, void and unenforceable. Under s 24(a) and (e) of the Contracts Act 1950, an agreement was illegal and unenforceable when either the consideration or the object of the agreement was to do an act forbidden by the law and the court regarded it as opposed to public policy (see paras 28–29).

(3) The plaintiff's claim against the defendant was in respect of a debt. It was not against the land. He had no caveatable interest. The caveat lodged should be removed. The defendant did not testify that he had sustained loss as a result of the caveat lodged. He did not testify that he could not sell his share in the property as a result of the caveat and that he had sustained loss. The defendant had not established that he had sustained loss or that he was entitled to damages as such (see para 30).

[Bahasa Malaysia summary

Plaintif telah menuntut sejumlah RM2,070,000 iaitu baki wang tertunggak yang diberi pinjam kepada defendan. Secara alternatif, plaintif telah mempli dan mendakwa bahawa defendan telah mengakui jumlah keseluruhan RM2,875,000 yang terhutang dan kena dibayar oleh defendan kepada plaintif menurut suatu perjanjian bertarikh 17 Mei 2011 di mana defendan bersetuju untuk membayar jumlah tersebut sebanyak 25 ansuran bulanan sebanyak RM115,000. Plaintif berhujah bahawa dia telah membayar RM2,875,000 kepada mendiang Chan Yau Chiang ('Chan') dan Huang Yu Kiang ('Huang') untuk menyelesaikan hutang yang tertunggak kepada mereka bagi pihak defendan. Ia harus diperhatikan bahawa plaintif telah memasukkan kaveat terhadap separuh bahagian defendan ke atas hartanahnya yang terletak di Kuching. Defendan telah menafikan tuntutan plaintif dan mengatakan bahawa dia telahpun membayar sebahagian daripada hutang judi dan faedah terakru yang dikenakan oleh plaintif. Defendan berhujah bahawa jumlah RM2,875,000 yang diperoleh sebahagiannya daripada hutang berjudi dan sebahagiannya daripada faedah yang terakru ke atas hutang berjudi adalah tidak betul. Defendan selanjutnya berhujah bahawa oleh kerana plaintif tiada lesen sah untuk menjalankan operasi sebagai junket kasino dan pemberi pinjam wang, RM2,875,000 yang dituntut oleh plaintif tersebut adalah menyalahi undang-undang. Isu untuk keputusan mahkamah adalah sama ada plaintif telah memberi pinjaman apa-apa wang kepada defendan.

Diputuskan, menolak tindakan plaintif dengan kos RM25,000 tertakluk kepada alokatur:

(1) Plaintif tidak mengemukakan apa-apa bukti bahawa: (a) dia memberi pinjaman sejumlah RM1,150,000 atau RM2,070,000 atau

RM2,875,000 kepada defendan; dan (b) dia telah membayar sama ada jumlah-jumlah tersebut kepada mendiang Chan dan Huang bagi pihak defendan. Oleh itu, atas imbangan kebarangkalian, plaintif telah gagal untuk membuktikan bahawa dia telah memberi pinjaman RM2,070,000 kepada defendan atau bahawa dia telah membayar RM2,875,000 kepada mendiang Chan dan Huang untuk menyelesaikan hutang yang tertunggak kepada mereka bagi pihak defendan (lihat perenggan 21 & 23).

(2) Di bawah s 26 Akta Undang-Undang Sivil 1956 dan s 31 Akta Kontrak 1950, semua perjanjian melalui perjudian atau taruhan hendaklah terbatal, tidak sah dan tidak boleh dikuatkuasakan. Di bawah s 24(a) dan (e) Akta Kontrak 1950, suatu perjanjian adalah menyalahi undang-undang dan tidak boleh dikuatkuasakan jika balasan atau tujuan perjanjian adalah untuk melakukan perbuatan yang dilarang oleh undang-undang dan mahkamah menganggap ia adalah bertentangan dengan polisi awam (lihat perenggan 28–29).

(3) Tuntutan plaintif terhadap defendan adalah berkaitan hutang. Ia bukan terhadap tanah. Dia tidak mempunyai kepentingan kaveat. Kaveat yang dimasukkan hendaklah dibatalkan. Defendan tidak memberi keterangan bahawa dia telah mengalami kerugian akibat daripada kemasukan kaveat. Dia tidak memberi keterangan bahawa dia tidak boleh menjual bahagian hartanahnya akibat kaveat itu dan bahawa dia telah mengalami kerugian. Defendan tidak membuktikan bahawa dia telah mengalami kerugian atau bahwa dia berhak kepada ganti rugi (lihat perenggan 30).]

Notes

For cases on claim for money lent, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 4149–4150.

Cases referred to

Dato' Ting Ching Lee & Ors v Ting Siu Hua [2016] 2 CLJ 933, HC (refd)
Hong Yik Trading v Liziz Plantation Sdn Bhd [2017] 5 MLJ 398, FC (refd)
Jupiters Ltd (trading as Conrad International Treasury Casino) v Gan Kok Beng & Anor [2007] 7 MLJ 228, HC (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)
Star Cruise Services Ltd v Overseas Union Bank Ltd [1999] 2 SLR 412, HC (refd)

Legislation referred to

Civil Law Act 1956 s 26
Contracts Act 1950 ss 24, 24(a), (e), 31

William Kong (William Kong & Company Advocates) for the plaintiff.
Clement Wong (Clement and Company Advocates) for the defendant.

Stephen Chung J:

[1] The plaintiff pleaded and claimed a sum of RM2,070,000 being the outstanding balance of money lent to the defendant.

[2] Alternatively, the plaintiff pleaded and claimed that the defendant had admitted a total sum of RM2,875,000 due and payable by the defendant to the plaintiff pursuant to an agreement dated 17 May 2011 wherein the defendant agreed to pay the said sum by 25 monthly instalments of RM115,000 commencing on 20 May 2011.

[3] The plaintiff claimed that the defendant had defaulted in paying the sum owing. The plaintiff said he lodged caveat No L268081/2012 registered on 28 September 2012 against the defendant's one-half share of his landed property described as Lot 3971, Block 218, Kuching North Land District as security for the sum due. In para 3 of his statutory declaration in support of the caveat to be lodged, the plaintiff stated that as at 28 September 2012, the defendant owed him RM1,150,000.

[4] The defendant denied the plaintiff's claims. the defendant asserted that the plaintiff never lent any money to him and he never received the sum of RM2,875,000 from the plaintiff. The defendant contended that the sum of RM2,875,000 stated in the agreement was inclusive of interests amounting to RM1,225,000 imposed at an exorbitant rate of 3% per month ie 36%pa for 25 months.

[5] The defendant claimed that it was a gambling debt incurred in casino junkets organised by the plaintiff totalling to the sum of RM1,650,000 but he had fully settled the debt by way of cash payments and cheques of RM115,000 each given to the plaintiff.

[6] The defendant contended that the interest was unlawful because the plaintiff was not a licensed moneylender and that the agreement was null and void as it was tainted with illegality. The defendant submitted that the plaintiff was not entitled to any sum claimed and it was not enforceable under the law.

[7] The plaintiff's case. The plaintiff testified that he had known the defendant for a long time but only knew him well since 2000. He said this matter started in 2010 because the defendant owed people a lot of money and the defendant approached him for help. He said he helped the defendant to

A settle with two of his creditors namely the late Chan Yau Chiang known as Ogu and Huang Yu Kiung. He said the defendant agreed to pay him RM2,875,000 for fully settling the debts he owed to these two persons. He said he lent the money to the defendant to pay and settle the debts with these two persons. He said the defendant issued cheques to these two persons which were returned to
B him when he settled the defendant's debts with them.

[8] He said the defendant agreed to sign an agreement to record the defendant's promise to pay the RM2,875,000 to him. He said the defendant gave him a photocopy of his identity card to prepare the agreement. At the time
C of signing the agreement the defendant gave him 25 cheques to settle the 25 monthly instalments of RM115,000 each as agreed in the agreement. These 25 cheques comprised of 21 Public Bank Bhd cheques and four Hong Leong Bank cheques, some by the defendant and some by CT Motor Co, and the first
D of the 25 monthly instalments was to start on 20 May 2011.

[9] The plaintiff testified that the defendant had furnished to him the 25 post-dated cheques and he had used some of the post-dated cheques by transferring them to third parties. He said he had to deposit money in favour of
E the defendant's account so that some of his post-dated cheques could be honoured. He said sometimes the defendant had asked him not to bank in some of the post-dated cheques and had given replacement cheques to him. He said he had lost some of the 25 post-dated cheques and could not produce them in court. He did not explain who were these third parties and for what
F purposes.

[10] He said in September 2012 he could not find the defendant and he found out that the defendant had left Kuching. As he was worried, he asked his lawyer to assist him to lodge a caveat against the defendant's one-half share of
G his house as security for payment of the debt due. He said the defendant had defaulted and that 18 of the monthly instalments had not been paid. He said the defendant had breached the agreement and he suffered losses of RM2,070,000.

H **[11]** He said he never threatened or used violence on the defendant to force him to pay the debt to him. He said his brother Tony Wong Ha Noan (PW2) had helped to approach the defendant for payment and his brother also did not threaten or use violence on the defendant. He said he did not use or engage any debt collector to collect or to threaten the defendant to pay the debt due.

I

[12] The defendant's case. The defendant testified that he had known the plaintiff for a long time. He said the plaintiff was involved in casino junkets and that was how he started to get involved in gambling at casinos organised by the plaintiff.

[13] He said the plaintiff brought him to the casino at Genting Highlands from 2006–2012 and he lost moneys in gambling and incurred the gambling debt. He said the plaintiff acting as junket leader had provided him with credits for gambling at the casino and whenever he lost in gambling he would be indebted to the plaintiff for the losses. He said it was a gambling debt and not money lent by the plaintiff to him.

[14] He said he had duly paid part of the gambling debt and the accruing interest charged by the plaintiff. He said that however by the end of April 2011, based on the plaintiff's calculation, the plaintiff alleged that he still owed the plaintiff the gambling debt of RM1,650,000 inclusive of interest.

[15] He said the sum of RM2,875,000 derived partially from the gambling debt and partially from accruing interest on the gambling debt was incorrect. He said since the plaintiff had no valid license to operate as casino junket and moneylender, the said RM2,875,000 claimed by the plaintiff was illegal.

[16] I have read the submissions and the authorities cited by the parties. It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist. Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lie fails to discharge it, the other party need not call any evidence: *Hong Yik Trading v Liziz Plantation Sdn Bhd* [2017] 5 MLJ 398.

[17] The first issue was whether the plaintiff lent any money to the defendant. The plaintiff pleaded and claimed a sum of RM2,070,000 being the outstanding balance of money lent to the defendant. The defendant denied and claimed that he did not receive this sum or any part thereof as money lent or given to him. During the trial the plaintiff did not produce any agreement or account or cheques issued by the plaintiff in favour of the defendant or any receipt or acknowledgement by the defendant that the plaintiff had lent and the defendant had received this sum of money to substantiate the plaintiff's claim that he lent this sum to the defendant.

[18] The plaintiff also did not explain why and how the sum of RM2,070,000 lent to the defendant became RM2,875,000 which he pleaded in the alternative. He did not plead that the difference was due to interest charged nor did he set out the interest rate. The plaintiff did not reconcile the three sums ie RM1,150,000, RM2,070,000 and RM2,875,000 and how they were derived.

[19] The plaintiff then said that the defendant owed a lot of money to the late Chan Yau Chiang (Ogu) and Huang Yu Kiung and he helped to settle the

defendant's debts to these two persons and that the defendant agreed to pay him RM2,875,000 for fully settling the debts he owed to these two persons. This sum is stated in the agreement dated 17 May 2011. However the plaintiff did not plead in his amended statement of claim that he paid this sum to these two persons on behalf of the defendant as debts owing to them. He did not plead that the defendant owed him this sum because he settled the debts on behalf of the defendant upon the defendant's request. The plaintiff must be bound by his own pleadings.

[20] Reading the agreement, it did not refer to any debt owing by the defendant to these two persons amounting to RM2,875,000. Instead recital 2 states that the debtor (the defendant) had at various times in the past requested the creditor (the plaintiff) to assist the debtor in the debtor's financial matters and that the creditor had and did advance money to the debtor at various times in the past. These averments in the agreement contradicted the assertions of the plaintiff and his brother (PW2) in their witness statements.

[21] As stated above, the plaintiff did not produce any proof that he lent the sum of RM1,150,000 or RM2,070,000 or RM2,875,000 to the defendant. He did not produce any proof that he had paid either of these sums to the late Chan Yau Chiang (Ogu) and Huang Yu Kiung on behalf of the defendant. He did not produce any proof to show that he was financially able to lend either of these sums to the defendant or to settle the debt on behalf of the defendant. He did not produce any document or proof that the defendant owed the sum of RM2,875,000 to these two persons and that he had paid the debts amounting to RM2,875,000 to these two persons. These raised the veracity of his claim that he settled this sum on behalf of the defendant which was the basis for the agreement.

[22] It should be noted that although the plaintiff has referred to the 25 post-dated cheques in his amended statement of claim, the plaintiff did not sue on the cheques. It should be noted that these cheques given were in respect of the alleged debt stated in the agreement. These cheques were not separate debts owing to the plaintiff.

[23] On evidence adduced, on a balance of probabilities, the plaintiff has failed to prove that he lent the sum of RM2,070,000 to the defendant or that he paid RM2,875,000 to the late Chan Yau Chiang (Ogu) and Huang Yu Kiung to settle the debts owing to them on behalf of the defendant.

[24] The defendant testified that he owed a gambling debt amounting to RM1,650,000 inclusive of interest and that he had partly settled the debt to the plaintiff. He said he incurred the debt from gambling via casino junkets at Genting Highlands arranged by the plaintiff. He said based on calculations by

the plaintiff he owed RM2,875,000 inclusive of interest at 3% per month to the plaintiff. Pursuant to the agreement he agreed to pay the sum of RM2,875,000 by 25 instalments of RM115,000 each. The evidence showed that he gave 25 post-dated cheques to the plaintiff and seven of these cheques had been paid.

[25] The plaintiff denied that it was a gambling debt or that he organised or arranged the casino junkets. However, as stated above, the plaintiff failed to establish that he had lent the sum of RM2,070,000 to the defendant or that he had paid the sum of RM2,875,000 to Chan Yau Chiang (Ogu) and Huang Yu Kiung on behalf of the defendant. It should be noted that Huang Yu Kiung was referred to as a junket operator for casino gambling in the case of *Dato' Ting Ching Lee & Ors v Ting Siu Hua* [2016] 2 CLJ 933. On evidence, it was probably a gambling debt and contrary to statutes.

[26] It should be noted that the casino at Genting Highlands is a licensed casino and legal. However the debt is not owed to Genting and Genting is not suing on the gambling debt and not a party to this suit. The plaintiff is.

[27] Under s 26 of Civil Law Act 1956:

(1) All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void;

(2) No action shall be brought or maintained in any Court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made;

(3) Subsections (1) and (2) shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime or exercise;

(4) Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by subsections (1) and (2), or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

Under s 31 of the Contracts Act 1950:

(1) Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which

A any wager is made.

Under s 24:

The consideration or object of an agreement is lawful, unless:

B (a) it is forbidden by a law;

...

(e) the court regards it as immoral, or opposed to public policy.

C **[28]** Under s 26 of the Civil Law Act 1956 and s 31 of the Contracts Act 1950, all agreements by way of gaming or wager shall be null, void and unenforceable. When a contract is made void by a statute, no right or obligation can arise from it. It is deprived of all legal force. It cannot be sued upon. The pretended contract is no contract at all. No subsequent right can be D founded on it: see *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 2 SLR 412; *Jupiters Ltd (trading as Conrad International Treasury Casino) v Gan Kok Beng & Anor* [2007] 7 MLJ 228.

E **[29]** Under s 24(a) and (e) of the Contracts Act 1950, an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an act forbidden by law and the court regards it as opposed to public policy: see *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151.

F **[30]** The plaintiff's claim against the defendant is in respect of a debt. It is not against the land. He has no caveatable interest. The caveat lodged should be removed. The defendant did not testify that he had sustained loss as a result of the caveat lodged. He did not testify that he could not sell his share in the G property as a result of the caveat and that he had sustained loss. He did not testify that there was a buyer and that the sale could not proceed as a result of the caveat and thereby had sustained loss. He did not give a figure for the sale or loss. The defendant has not established that he had sustained loss or that he is entitled to damages as such.

H **[31]** The plaintiff's action is dismissed with cost of RM25,000 and to pay the allocatur.

Plaintiff's action dismissed with costs of RM25,000 subject to allocator.

I Reported by Dzulqarnain Ab Fatar